No. 85-1580

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

WILLIAM RUTTER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN J. MAGUIRE
Counsel for Petitioner
LAW OFFICES OF RICHARD HARTMAN
252-00 Horace Harding Expressway
Little Neck, NY 11362
(718) 423-1800

THE REPORTER COMPANY, INC., 30 Vesey St., New York, NY 10007—212 732-6978—1985
(5213)

46 pp

Questions Presented.

1. Whether the Court of Appeals erred in affirming the determination of the Tax Court which held that Sick Leave payments made to Petitioner were not made under a statute in the nature of a Workmen's Compensation Act.

2. Whether Revenue Ruling 83-77 should not be applied retroactively because its application would cause unduly harsh effects upon Petitioner and all other similarly situated or because of prior administrative practice.

Table of Contents.

	Page
Questions Presented	i
Opinion Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	5
Reasons for Granting the Writ	8
POINT I. The Court of Appeals erred in affirming the determination of the Tax Court which held that sick leave payments made to petitioner were not made under a statute in the nature of a Workmen's Compensation Act	8
POINT II. Revenue ruling 83-77 should not be applied retroactively because its application would cause unduly harsh effects upon Petitioner and all other similarly situated or because of prior administrative practice	26
Conclusion	28

Index to Appendix.

Page

APPENDIX A—Memorandum Finding of Facts and Opinion of the United States Tax Court 1a

APPENDIX B—Decision of the United States Tax Court 1b

APPENDIX C—Opinion and Decision of the United States Court of Appeals for the Second Circuit .. 1c

TABLE OF AUTHORITIES.

CASES:

Berent v. County of Erie, 86 A.D.2d 764, 448 N.Y.S.2d 282 (4th Dept., 1982) 24

Chock Full O'Nuts Corp. v. U.S., 453 F.2d 300 (2d Cir., 1971) 26

Clifford v. Commissioner, T.C. Memo. 1984-426 . 9, 20, 21, 22

Dixon v. United States, 381 U.S. 68, 71 (1965) 26

Dunn v. U.S., 468 F. Supp. 991 (S.D.N.Y. 1978) 26, 27

Dyer v. Commissioner, 71 T.C. 560 (1979), acq. in result, 1979-2 C.B. 1 ..... *passim*

Haar v. Commissioner, 78 T.C. 868, affd. *per curiam* 709 F.2d 1206 (8th Cir. 1983) 9, 12

Kurcsics v. Merchants Mutual Insurance Co., 49 N.Y.2d 45, 426 N.Y.S.2d 454 (1980) 24

Page

Neill v. Commissioner, 17 T.C. 1015 (1951), acq. 1972-1 C.B. ..... *passim*

Take v. Commissioner, 82 T.C. 630, 634 (1984) ... 9, 10, 11, 12

FEDERAL STATUTES:

Internal Revenue Code §104(a)(1) ..... *passim*

1939 I.R.C. Section 22(b)(5) 19

Treas. Reg. §1.104.1(b) 8, 25

28 U.S.C. §1254(1) 2

OTHER AUTHORITIES:

Administrative Code of the City of New York §434a-14.0(c) ..... *passim*

Los Angeles City Charter §183 ..... *passim*

Revenue Ruling:

83-77 ..... 8, 16, 27

80-84 ..... 16, 17, 18, 21

Rule 122 of the Tax Court Rules of Practice and Procedure 7

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM RUTTER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI.

Petitioner, William Rutter, prays for a *Writ of Certiorari* to review an Order of the United States Court of Appeals for the Second Circuit, entered on April 29, 1985, which affirmed an Order and Decision of the United States Tax Court, Peter J. Panuthos, Special Trial Judge, that held payments Petitioner received while on Sick Leave were not excludable from his gross income on the grounds that the payments were not amounts received under a Workmen's Compensation Act or under statute in the nature of a Workmen's Compensation Act.

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit, affirming the Order and Decision of the United States Tax Court appears at page 1c to page 6c of the attached Appendix. The opinion has been officially reported at 760 F.2d 466 (2d Cir., 1984).

Jurisdiction.

The final Order of the United States Court of Appeals for the Second Circuit, was entered April 29, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This Court has jurisdiction of the controversy because it involves a ". . . petition of [a] party to [a] civil . . . case, . . . after rendition of judgment or decree." 28 U.S.C. §1254(1).

Statutory Provisions Involved.

Internal Revenue Code §104(a)(1).

Administrative Code of the City of New York §434a-14.0(c).

Los Angeles City Charter §183.

INTERNAL REVENUE CODE

SEC. 104. COMPENSATION FOR INJURIES OR SICKNESS

(a) In General.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

> (1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of Section 808 of the Foreign Service Act of 1980; and

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a violent attack which the Secretary of State determines to be a terrorist attack and which occurred while such individual was an employee of the United States engaged in the performance of his official duties outside the United States.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employer within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from the tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee.

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK.

§ 434a-14.0 Discipline of members.—a. The commissioner shall have power, in his discretion, on conviction by him, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force; but no more than thirty days' salary shall be forfeited or deducted for any offense. All such forfeitures shall be paid forthwith into the police pension fund.

b. Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner, or one of his deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe. (Subd. b amended by L. L. 1962, No. 10, March 7; L. L. 1955, No. 30, May 6.)

c. The commissioner is also authorized and empowered in his discretion, to deduct and withhold salary from any member or members of the force, for or on account of absence for any cause without leave, lost time, sickness or other disability, physical or mental; provided, however, that the salary so deducted and withheld shall not, except in case of absence without leave, exceed one-half thereof for the period of such absence; and provided, further, that not more than one-half pay for three days shall be deducted on account of absence caused by sickness. (Par. c as amended by L. L. 1940, No. 6, February 13.)

d. Upon having found a member of the force guilty of the charges preferred against him, either upon his plea of guilty or after trial, the commissioner or the deputy examining, hearing and investigating the charges, in his discretion, may suspend judgment and place the member of the force so found guilty upon probation, for a period not exceeding one year; and the commissioner may impose punishment at any time during such period.

Section 183 of the Los Angeles City Charter provides, in pertinent part:

> Sec. 183. Whenever any member of the Fire or Police Department shall die as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement, or while eligible to retirement from such department on account of years of service, then an annual pension shall be paid in equal monthly installments to his widow, or child or children, or dependent parent or parents, in an amount equal to one-half (½) of the average monthly rate of salary assigned to the ranks or positions held by such member during the three years immediately preceding the time of his death or the date of his retirement from active duty in such department . . . (Rev. Rul. 80-84).

Statement of the Case.

Petitioner, a Police Officer in the New York City Police Department, retired from the Department on October 29, 1978. Previously, on July 29, 1972, while employed as a Police Officer, Petitioner sustained a line of duty injury. The New York City Police Department assigned Control number 2083 to this line of duty injury. Petitioner's injury was given official "line of duty" designation pursuant to the regulations of the New York City Police Department.

During the year 1978, Petitioner was absent from work due to his old line of duty injury, designated by the Police Department as No. 2083 for the following periods of time: January 1, 1978 to February 19, 1978, February 20, 1978 to March 12, 1978, and April 24, 1978 to August 17, 1978. During his absence from work in 1978 and prior to his retirement in October, 1978, Petitioner received sick-leave payments for the aforementioned periods amounting to $10,873.00. These payments were made to Petitioner as sick pay in 1978 pursuant to a union contractual provision which is consistent with Section 434a-14.0(c) of the Administrative Code of the City of New York.

The contract and code provisions each provide, respectively, that a police officer shall receive leave with pay due to illness or injury whether or not service-connected. While Petitioner would have received the same sick leave payments had his absence from work been due to a non-service connected illness or injury, the New York City Police Department certified that Petitioner was on sick leave in 1978 due to the line of duty injury he sustained in 1972.

A statutory notice of deficiency was sent to petitioner on April 8, 1982. In this notice of deficiency, Respondent disallowed an exclusion for disability income in the amount of $10,873.00 which had been claimed by Petitioner on his 1978 tax return.

* * *

In his Memorandum Decision, the Special Trial Judge confirmed the determination of Respondent, as alleged. The Special Trial Judge stated that the only issue in this controversy was whether payments received by Petitioner while on sick leave from the New York City Police Department were excludable as amounts received under a workmen's compensation act or a statute in the nature of a workmen's compensation act.

It was noted that the matter had been submitted fully stipulated pursuant to Rule 122 of the Tax Court Rules of Practice and Procedure.

The Special Trial Judge held that the payments made to Petitioner were not under a statute in the nature of a workmen's compensation act because the relevant statutory and contractual provisions before the Court did not allow payments solely for personal injuries or sickness incurred in the course of employment.

Because said statutory and said contractual provisions provide such a latitude for payment of salary to a Police Officer on sick leave, irrespective of the causative reasons thereto, the Special Trial Judge confirmed the deficiency.

An appeal was taken to the United States Court of Appeals for the Second Circuit.

* * *

In a *per curiam* decision, the United States Court of Appeals affirmed the decision of the Tax Court. The Court below held that Petitioner had, under the circumstances, failed to establish that he received his Sick Leave pay pursuant to a "statute" or "under a statute in the nature of a Workmen's Compensation Act."

The Court below stated that Petitioner's payments were not made pursuant to regulation but under a labor contract, which is an agreement between a union and a public employer, and modifiable at any time.

The Court below did not accept Petitioner's argument that a section of the New York City Administrative Code, §434a-14.0(c), was a statute "in the nature of a Workmen's Compensation Act." It was found to be a statute where New York City Police Officers received compensation for sick leave, whether work related or not.

The Court below also rejected Petitioner's claim that Respondents erred in applying Revenue Ruling 83-77 retroactively, stating that nothing in the record indicated that Respondents abused their discretion on this point.

The instant Petition for a Writ of Certiorari ensued.

Reasons for Granting the Writ.

POINT I.

The Court of Appeals erred in affirming the determination of the Tax Court which held that sick leave payments made to Petitioner were not made under a statute in the nature of a Workmen's Compensation Act.

In the instant Petition, the principle issue is whether Section 434a-14.0(c) of the Administrative Code of the City of New York is a statute in the nature of a Workmen's Compensation Act pursuant to Treas. Reg. §1.104-1(b). This section provides, in pertinent part:

> Section 104(a)(1) excludes from gross income amounts which are received by an employee under a workmen's compensation act . . . or under a statute in the nature of a workmen's compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment.

Case law and a prior administrative ruling of Respondent support Petitioner's contention that Section 434a-14.0(c) is a statute in the nature of a Workmen's Compensation Act even though this section provides payments for absence from work due to non-service connected injuries or sickness, as well as for injuries or sickness incurred in the course of employment. *Dyer v. Commissioner,* 71 T.C. 560 (1979), *acq. in result,* 1979-2 C.B. 1; *Neill v. Commissioner,* 17 T.C. 1015 (1951), *acq.* 1972-1 C.B.; see, also Rev. Rul. 80-84.

The Tax Court in its opinion (T.C. Memo, 1984-525) stated, in part:

> The only issue for decision is whether payments received by . . . petitioner . . . while on sick-leave are excludible under Section 104(a)(1) as amounts received under a Workmen's Compensation Act or a statute in the nature of a Workmen's Compensation Act . . .
>
> Since the parties agree that the payments received by petitioner were not payments made under a Workmen's Compensation Act, we must determine whether such payments were made pursuant to a statute in the nature of a Workmen's Compensation Act. *A statute is in the nature of a Workmen's Compensation Act only if it allows payments solely for personal injuries or sickness incurred in the course of employment.* (Emphasis added.)

Based upon the foregoing reasoning, the Tax Court held that payments made to Petitioner were not made under a statute in the nature of a workmen's compensation act. In so holding, the Tax Court relied upon *Take v. Commissioner,* 82 T.C. 630, 634 (1984); *Haar v. Commissioner,* 78 T.C. 868, affd. *per curiam* 709 F.2d 1206 (8th Cir. 1983); and *Clifford v. Commissioner,* T.C. Memo 1984-426.

Petitioner contends that *Take v. Commissioner,* was incorrectly decided; that *Clifford v. Commissioner,* dealing with virtually identical facts, was incorrectly decided; and that *Haar v. Commissioner,* dealing with entirely different facts, is inapplicable.

* * *

Take v. Commissioner, supra, was utilized by the Tax Court for the proposition that a statute in the nature of a Workmen's Compensation Act must be limited solely to payments for service-connected injuries or sickness. In the case, the Court

denied both the taxpayers and the Internal Revenue Service's Motions for Summary Judgment. At issue was whether an ordinance providing occupational disability benefits pursuant to three paragraphs was a statute in the nature of a Workmen's Compensation Act.

The Court in denying petitioner's motion held that paragraph two of the ordinance, containing an irrebuttable presumption that an employee's heart, lung, and respiratory illnesses are occupationally related, was not a statute in the nature of a workmen's compensation act. The Court explained:

> Paragraph 2 does not sufficiently limit the criteria for compensability to meet the requirement that the statute allow disability payments solely for service related personal injury or sickness. *Take* at 635.

In denying respondent's motion, the Court stated, in part:

> Paragraph 1 requires that the occupational disability be received while performing official duties, and it is a statute in the nature of a workmen's compensation act (citations omitted).
>
> Paragraph 1 does not exclude an illness listed under Paragraph 2. Therefore, it is possible for an employee who has a heart, lung or respiratory illness to establish occupational causation as required under Paragraph 1.
>
> Respondent has not made the requisite showing that petitioner received disability payments pursuant to Paragraph 2 rather than Paragraph 1. The materials respondent has submitted in support of his motion and other acceptable materials indicate only that petitioner was granted permanent disability benefits and that the physicians examining petitioner did not state that petitioner's illness was occupationally related. Respondent did not submit minutes of the Plan board meeting in

> which benefits were awarded to petitioner nor has he presented affidavits or testimony which would indicate whether a determination of causation was made and whether petitioner received benefits under Paragraph 1 or Paragraph 2. These are genuine issues of material fact for which a determination must be made before a judgment can be rendered as a matter of law. Therefore, we must and do deny respondent's motion. *Take* at 637.

Under the *Take* ruling, as cited above, an ordinance with two separate paragraphs was found, in one paragraph, to be a statute in the nature of a workmen's compensation act. While the Court in *Take* followed the line of reasoning espoused by the Court below in the instant appeal, it also laid emphasis upon the necessity for a showing by the taxpayer that he had, in fact, received disability benefits due to an injury or sickness incurred in the course of employment.

Petitioner submits that the *Take* decision, while supporting Respondent's reasoning in the instant Appeal, also supports Petitioner, at least insofar as the *Take* Court laid emphasis upon the reason for such disability payments. In the instant appeal, it is uncontroverted that Petitioner has established that he received sick leave payments as a result of absence due to an old line of duty injury. Petitioner contends that the fact that Section 434a-14.0(c) provides for such payments, whether or not service-connected, is immaterial as long as there is a factual showing that such payments were made to Petitioner for a service-connected injury. While Section 434a-14.0(c) does not contain two separate paragraphs, as did the ordinance in *Take*, Petitioner respectfully submits that this fact alone should not be determinative in the instant matter. *Dyer v. Commissioner*, 71 T.C. 560 (1979), *Neill v. Commissioner*, 17 T.C. 1015 (1951); see also Rev. Rul. 80-84.

Indeed, under the scheme for New York City Police Officers, when sick leave is compensated, the leave and the payments received are clearly and completely designated, as being work

related or not work related. Thus, there can be no question as to whether a particular payment made to a New York City Police Officer on sick leave was due to a line-of-duty injury or non-line-of-duty cause. For this reason, the fact that Section 434a-14.0(c) does not contain two separate paragraphs as did the ordinance in *Take,* is not a necessary requirement for the section to be considered to be one in a nature of a Workmen's Compensation Act.

The Court below also relies upon *Haar v. Commissioner,* 78 T.C. 868, aff'd. *per curiam* 709 F.2d 1206 (8th Cir. 1983) for the following proposition:

> A statute will not be considered akin to a worker's compensation act if it allows for disability payments other than on-the-job injuries. *Riley v. United States,* 140 Ct. Cl. 381, 156 F. Supp. 751. *Haar* at 868.

In *Haar,* the Tax Court found that Section 104(a)(1) was inapplicable because the Civil Service Retirement Act, pursuant to which disability payments were made to Haar " . . . allows retirement on disability regardless of whether the disabling injury or disease was incurred on the job." *Haar* at 868. However, Haar was not disabled as the result of injuries or sickness incurred in the course of his employment at the General Services Administration. Rather, he was disabled due to a hearing disability incurred prior to such employment as the result of a war injury.

In contrast, in the instant petition it is uncontroverted that petitioner received sick leave payments from the New York City Police Department in 1978 for absence from work due to a line of duty injury incurred in the course of employment in that Department. Accordingly, *Haar* is inapplicable in the instant matter.

* * *

It is petitioner's contention that a statute is in the nature of a workmen's compensation act even though it provides compen-

sation to employees both for service-connected and non-service connected injuries or sickness, and that a taxpayer is entitled to exclude amounts received under such a statute from gross income as long as the taxpayer has made a showing that such payments were, in fact, received due to injuries or sickness incurred in the course of his employment.

In *Dyer v. Commissioner, supra,* the Tax Court held that payments made to petitioner, a New York public school teacher, while on leave with pay due to an injury incurred in the course of her employment, were received under a statute in the nature of a workmen's compensation act and, hence, were excludable under Section 104(a)(1). The issue in *Dyer* was whether or not the payments made to petitioner pursuant to the regulations of the Board of Education of the City of New York, issued on November 19, 1971, by Special Circular No. 25, were made "under a statute". With respect to these regulations, the Court stated, in part:

> Pursuant to regulations of the Board of Education of the City of New York issued on November 19, 1971, by Special Circular No. 25, teachers earn sick leave at the rate of one day per month of service. Unused sick leave accrues to the credit of the teacher and is referred to as the Cumulative Absence Reserve. If an employee is injured or becomes ill other than in the line of duty, he receives his full salary to the extent that he has accrued sick leave or is permitted to borrow sick leave. The amount of time the teacher is absent is deducted from his or her account in the Cumulative Absence Reserve. However, if the employee is injured in the line of duty no such deduction is made. Petitioner's injury fell within the latter category. The entire amount paid to petitioner during her absence in 1973 was reported on her W-2 form as wages for that year. *Dyer* at 561.

The Court noted that pursuant to the statutory law of the State of New York, the Board of Education had issued these

regulations which provided that . . . "teachers injured in the line of duty should receive full pay during their absences without a deduction against their accrued sick leave." These regulations have the force and effect of law." *Dyer* at 562. In holding for the petitioner, the Court concluded:

> In view of the statutory nature of the regulations of the Board of Education, the absence of any other provisions for compensation as a result of injury suffered in the line of duty, and the fact that petitioner was not charged with sick leave during the period she was being paid, we hold that the payments made to her for the period January 1, 1973, until her retirement on October 26, 1973, were received under a statute in the nature of a workmen's compensation act and are excludable from her gross income under section 104(a)(1). *Dyer* at 563.

The regulations at issue in *Dyer* contain certain procedures governing sick leave (excuse of absence for personal illness) for both service-connected (line of duty) and non service-connected illness. Significantly, the Court found these regulations constituted a statute in the nature of a workmen's compensation act, even though payments thereunder are not limited solely to service-connected illness or injury. Under the Board of Education Regulations, the distinction between service-connected and non-service-connected sick leave is found in the fact that a teacher, absent due to line of duty injury, is not charged with sick leave, or "cumulative absence reserve", during this period. See *Dyer* at 563. Presumably, petitioner in *Dyer* would have received the same amount of sick leave pay, i.e., full salary, whether or not her illness was service-connected for the purposes of the 104(a)(1) exclusion.

In *Dyer*, Respondent also argued that payments made to petitioner were not in the nature of a workmen's compensation act ". . . apparently based on the fact that the amount paid was the same as her salary." *Dyer* at 562. The Court responded:

> From the case law, however, we conclude that whether a payment is in the nature of workmen's compensation depends upon whether the payment is made because of injuries sustained in the line of duty, not upon the amount paid. Compare *Neill v. Commissioner,* 17 T.C. 1015 (1951). *Frye v. United States* F. Supp. 405 (D.D.C. 1947), and *Boystel v. Commissioner,* T.C. Memo 1961-146, with *Golden v. Commissioner,* T.C. Memo 1971-162, and *Rembold v. Commissioner,* T.C. Memo, 1966-7. Moreover, this is the position respondent has taken in administrative rulings. Rev. Rul. 72-136, 1972-1 C.B. 35; Rev. Rul. 68-10, 1968-1 C.B. 50 (where the taxpayer received his *full pay* as a result of injury in the line of duty). *Dyer* at 562-63.

In view of the foregoing, the fact that the same amount is paid to an absent police officer, pursuant to Section 434a-14.0(c) of the Administrative Code, whether or not his injury or illness is service-connected, is not determinative as to whether he is entitled to a tax exclusion under Section 104(a)(1). Rather, the sole prerequisite is a finding that ". . . the payment is made because of injuries sustained in the line of duty." *Dyer* at 562.

Like Section 434a-14.0(c), Regulation No. 25 is not solely limited to leave with pay for personal injuries or sickness incurred in the course of employment. Therefore, *Dyer* supports Petitioner's contention that he is entitled to an exclusion under Section 104(a)(1) of the Code. Under the facts in *Dyer*, as in the instant action, it is uncontroverted that the taxpayer received sick pay as a result of absence due to a service-connected illness or injury. In each case, the petitioner was certified by his/her employer as being on leave with pay due to line of duty injury. This showing having been made, Petitioner contends he is entitled to exclude such payments from gross income under Section 104(a)(1).

Revenue Ruling 80-84 supports Petitioner's contention that Section 434a-14.0(c) is a statute in the nature of a workmen's compensation act even though that section is not limited solely to provide payments for absence from work due to injuries or sickness incurred in the course of employment. Revenue Ruling 80-84 is cited in Revenue Ruling 83-77 for the proposition that ". . . (a) statute is not in the nature of a workmen's compensation act unless it limits benefits to instances of work-related disability." To the contrary, Revenue Ruling 80-84 stands for the proposition that sick leave payments are excludable under Section 104(a)(1), whether or not the statute authorizing payments is limited solely to service-connected injuries or sickness, as long as there is a showing that, in fact, the payments were received due to injuries or sickness incurred in the course of employment.

Revenue Ruling 80-84 also supports Petitioner's contention that the amount of such payments is immaterial and, specifically, that it is immaterial whether the employee would receive the same amount of payments whether or not sick leave was due to a service-connected injury or sickness.

Revenue Ruling 80-84 held that death benefits received by beneficiaries of deceased Los Angeles, California, policemen and firemen, whose deaths were the result of service-connected injuries, were excludable under IRS Section 104(a)(1).

Section 183 of the Los Angeles City Charter, which was the statutory basis for such payments, provides, in part:

> Sec. 183. Whenever any member of the Fire or Police Department shall die as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement, or while eligible to retirement from such department on account of years of service, then an annual pension shall be paid in equal monthly installments to his widow, or child or children, or dependent parent or

> parents, in an amount equal to one-half (½) of the average monthly rate of salary assigned to the ranks or positions held by such member during the three years immediately preceding the time of his death or the date of his retirement from active duty in such department . . . (Rev. Rul. 80-84).

The single provison of Los Angeles City Charter in question, Section 183, as cited above, provides for death benefits to the beneficiaries of policemen and firemen upon any one of the following occurrences:

death due to service-connected injuries;

death after the retirement of the officer;

death while the officer is eligible to retire on account of years of service.

Significantly, Section 183 does not limit payments thereunder solely to instances of service-connected death. Rather, like Section 434a-14.0(c) of the New York City Administrative Code, Section 183 provides payments due to service-connected and non-service connected death, respectively. Specifically, Section 183 provides death benefit payments to beneficiaries where an officer dies while he is ". . . eligible to retire on account of years of service . . ." as well as where death is due to an injury sustained in the performance of duty.

Section 183 of the Los Angeles City Charter is clearly not a statute which allows for payment solely in cases where the death is incurred in the course of employment; Section 183 also provides exactly the same amount of payments (half-pay pension), whether or not the death was service-connected. Nevertheless, the IRS held:

> Charter section 183 benefits are excludable from gross income under section 104(a)(1) of Code if the recipient

> can establish either 1) that the benefits are received under the service-connected death provisions, or 2) that the benefits are received under the retirement provision and that the employee on account of whose death the benefits are paid was retired under Charter section 182 at the time of that employee's death (Rev. Rul. 80-84).

Under the facts in the instant appeal, it is uncontroverted that Petitioner has established that payments pursuant to Section 434a-14.0(c) were made to him for absence from work due to a service-connected injury. This injury was given official "line of duty injury designation", and Petitioner's sick leave records for the periods in question in 1978 are marked "OLOD", for old line of duty injury. As under Revenue Ruling 80-84, it is immaterial that Petitioner would have received sick leave payments under Section 434a-14.0(c) had his absence not been due to an injury sustained in the course of employment. As the IRS stated in Revenue Ruling 80-84:

> Accordingly, if a taxpayer can establish that the taxpayer's Charter section 183 benefits are received under the service-connected death provisions, those benefits will qualify for exclusion under section 104(a)(1) of the Code. *The fact that such a taxpayer could also have qualified for the same benefits under another provison of section 183 will not prevent the section 104(a)(1) exclusion from applying.* See *Neill v. Commissioner,* 17 T.C. 1015 (1951), aug., 1952-1 C.B. 3; Rev. Rul. 74-582, 1974-2 C.B.34. (Emphasis added.)

Neill v. Commissioner, 17 T.C. 1015 (1951), cited in Revenue Ruling 80-84, supports Petitioner's contention that a statute in the nature of a workmen's compensation act need not be limited solely to providing payments for personal injuries or sickness incurred in the course of employment.

In *Neill* the taxpayer, a Baltimore, Maryland police officer, sought to exclude from his gross income payments he received as retirement benefits for a service-connected disability.

The petitioner had received a pension from the Baltimore Police Department pursuant to a local law which

> empowered the Police Commissioner whenever, in his opinion, the efficiency of the service required it, to retire a policeman who has served faithfully not less than 16 years or who had been permanently disabled in the discharge of his duty as a policeman, and pay him a sum of money equal to one-half of the amount he was receiving at the time of his retirement . . . this law provided that the said Police Commissioner in all cases before retiring any officer of police . . . file among their records a certificate signed by a majority of physicians appointed by the Police Commissioner . . . that the person proposed to be retired has been thoroughly examined by them, and that he is incapable of performing active police duty. *Neill* at 1016.

Significantly, the statute in *Neill* was not limited solely to payments for injuries or sickness incurred in the course of employment. Under the statute, a half-pay pension was payable in instances where a policeman was found incapable of performing active police duty, whether or not his incapacity was due to an injury or sickness incurred in the course of employment, as long as the policeman had at least 16 years of service.

In addition, the statute provided that a policeman found to be permanently disabled in the discharge of duties would be entitled to the same pension irrespective of whether he had 16 years of service. Significantly, the statute in *Neill* provided the same amount of payments (half-pay pension) for service and for non-service-connected disability benefits, respectively. Nevertheless, the Court held that benefits paid under this statute were in the nature of workmen's compensation benefits, under 1939 I.R.C. Section 22(b)(5), the predecessor of Section 104(a)(1).

Neill stands for the proposition that a determination as to whether benefits paid under a sick leave statute, which are not

limited solely to service-connected injury or sickness, are in the nature of workmen's compensation depends primarily upon whether the payments are, in fact, made because of illness or injury stemming from the workmen's employment. In *Neill* the Court concluded:

> *It therefore becomes pertinent to inquire into the basis upon which petitioner was retired.* The record before us in this respect is not completely satisfactory. Some of the evidence is conflicting, inconclusive, or ambiguous. However we think that petitioner has placed before us all the evidence that was reasonably at his command, and we are satisfied and so find as a fact, in the light of the testimony and the record as a whole, that petitioner was retired in 1945 by reason of disability incurred in the line of duty, rather than because of service of the prescribed number of years on the police force. In the circumstances, we hold that his retirement pay was exempt under section 22(b)(5). *Neill* at 1016-17. (Emphasis added.)

Following *Neill*, the fact that a statute is not limited solely to payments for injuries or sickness incurred in the course of employment is not determinative as to whether benefits paid thereunder are in the nature of workmen's compensation.

In the instant appeal, following *Neill*, it is sufficient to show that Petitioner received benefits pursuant to a statute, which provides payments for service-connected injuries or illness, and that Petitioner has established, in fact, that his absence from work was due to a line of duty injury.

* * *

The Tax Court also relied upon *Clifford v. Commissioner*, T.C. Memo. 1984-426 [Para. 84, 426 P-H Memo TC], a decision concerning virtually identical facts to those in the instant appeal. In *Clifford*, the Court concluded:

> [n]either the union contract nor the relevant provision of the Administrative Code limited payments to illness or injury in the course of employment. Thus, neither is a statute in the nature of a workmen's compensation act. *Clifford* at 84, 426.

Petitioner contends that the foregoing conclusion, also reached by the Court below in the instant appeal, is not consistent with *Neill, Dyer* and Rev. Rul. 80-84, as explained below.

Petitioner also submits that *Clifford* erroneously concluded that for a statute to be in the nature of a worker's compensation act there must be a differentiation in benefits as between line-of-duty and non-line-of-duty injuries. In this regard, the Tax Court stated:

> Petitioner's reliance on *Dyer v. Commissioner, supra,* is misplaced. . . . The Board of Education regulations involved in *Dyer* clearly provided for different benefits depending upon whether the teacher's injury was incurred in the line of duty. Teachers were entitled to unlimited sick pay, without deduction for their accrued sick leave, only in the case of injuries incurred in the line of duty. *Clifford* at 84, 426.

To the contrary, Petitioner contends that a prerequisite for a statute to be in the nature of a workmen's compensation act is not that benefits provided thereunder be different in form, or amount, from those provided for non-service-connected injuries or sickness.

Now in Rev. Rul. 80-84, the Internal Revenue Service determined that Section 183 of the Los Angeles City Charter was a statute in the nature of a worker's compensation act, even though that statute provided exactly the same benefits (half-pay pension) whether or not the death of a member was due to a service-connected injury. Furthermore, Section 183, as a single provision, did not limit payments thereunder to service-

connected deaths, but also provided benefits where death occurred while an officer was eligible to retire on account of years of service. As the IRS stated:

> The fact that such a taxpayer could also have qualified for the same benefits under another provision of section 183 will not prevent the section 104(a)(1) exclusion from applying. See *Neill v. Commissioner,* 17 T.C. 1015 (1951) . . . Rev. Rul. 80-84.

Also see Petitioner's discussion of *Neill v. Commissioner, supra.* In *Neill*, the Court found a statute in the nature of a worker's compensation act, even though its payments were not limited solely to injuries incurred in the course of employment, and notwithstanding the fact that the benefits thereunder were the same (half-pay pension) whether or not the disability was incurred in the course of employment.

With respect to *Dyer v. Commissioner,* Petitioner contends that decision is incorrectly cited in *Clifford* for the proposition that a statute in the nature of a worker's compensation act must be solely limited to payments for injuries incurred in the course of employment. As Petitioner has discussed above, the issue in *Dyer* was whether regulations constituted a "statute". Notably, these regulations contain procedures governing sick leave both for line-of-duty and non-line-of-duty absences.

Furthermore, as the Court in *Dyer* stated:

> From the case law . . . we conclude that whether a payment is in the nature of workmen's compensation depends upon whether the payment is made because of injuries sustained in the line of duty, not upon the amount paid. *Dyer* at 562.

Significantly, under the facts in *Dyer, Clifford* and in the instant appeal, it was an established fact the payments were for absence due to injuries sustained in the line of duty. Moreover,

in each case, there was an official finding that petitioners were absent from work due to their respective line of duty injuries.

The Police Department Regulations, found in the Patrol Guide, set forth the specific procedures to be followed by a police officer to qualify for sick leave due to a service-connected illness or injury.* The procedures that must be followed by a police officer injured in the line of duty are distinct from those procedures which must be followed for non-line of duty injuries. It is mandatory for an officer to follow these procedures before the Department determines whether or not his injury is to be given "line of duty" status.

Exhibit 9-I (stipulated facts, Record on Appeal to the Court of Appeals) contains a copy of Patrol Guide Procedure #120-3 which sets forth the procedures which must be followed for line of duty injuries or illness. Exhibit 10-J contains a copy of Patrol Guide Procedure #120-1 which sets forth the procedures which must be followed for non-line of duty injuries or illness.

As Procedure #120-1 illustrates, a police officer who sustains a non-line of duty illness or injury need only inform his command, prior to reporting for duty, that he is unable to perform his duties.

Procedure #120-3, however, requires more elaborate reporting and investigation when a police officer is injured in the line of duty. There are many Police Department forms which must be completed: for example, a Line of Duty Injury Report, Witness Statements, a Police Accident Report, an Aided Report and an Accident Report—City Involved. Furthermore, the circumstances surrounding a line of duty injury must be thoroughly investigated by several other police officers. Before line of duty designation can be granted to an injured officer, said officer's Precinct Commander or Duty Captain must review the required reports and indicate his approval or disapproval of line of duty injury designation. Finally, all of the re-

*See Exhibits 9-I, 10-J (stipulated facts).

quired reports are forwarded for final approval or disapproval by the Police Commissioner.

Only after these procedures, required by Procedure #120-3, are complied with may a New York City Police Officer's illness or injury be given official line of duty injury designation.

In the instant action, it is uncontroverted that Petitioner was given official line of duty designation by the New York City Police Department for his 1972 injury. It is also uncontroverted that Petitioner received leave with pay in 1978 for absence incurred because of his line of duty injury, Number 2083. Accordingly, it is clear that Petitioner in fact, received sick leave payments in 1978 due to absence resulting from an on-the-job injury in 1972 which was given official line of duty designation by the New York City Police Department.

Regulations, such as those in the Patrol Guide, properly promulgated by an administrative agency and not in conflict with express statutory provisions, have the force and effect of law. *Kurcsics v. Merchants Mutual Insurance Co.,* 49 N.Y.2d 45, 426 N.Y.S.2d 454 (1980); *Berent v. County of Erie,* 86 A.D.2d 764, 448 N.Y.S.2d 282 (4th Dept., 1982).

* * *

The Court of Appeals, most respectfully, overlooked or did not give due weight to the circumstances, considerations, and arguments discussed above. The Court of Appeals, in its determination that Petitioner's payments were made under a labor contract and not pursuant to a regulation, most respectfully erred.

While it is true that a labor contract is an agreement between union and employer, and is modifiable at any time, to state that payments to Petitioner were made pursuant to a labor contract is to oversimplify and not accurately portray the true circumstances. While the statement of the Court of Appeals bears

a superficial resemblance to the circumstances, upon closer examination, it becomes clear that the present controversy involves a complex intermixture of statute and labor contract. The intermixture of contract and stature here so interweaves the two as to make it impossible to unravel and distinguish them. Therefore, Petitioner asserts that the Administrative Code provision and the labor contract provision are so intertwined so as to be the equivalent of a statute in the nature of a Workmen's Compensation Act.

Accordingly, there was no necessity for Petitioner to cite to the Court of Appeals any case in Treasury Regulation §1.104-1(b) where any "stretching" of labor contracts or any unnatural conversions of same occurred. In short, the Court below, most respectfully, oversimplified the circumstances, when it held Petitioner's sick leave payments not to be excludable from his gross income merely because of the existence of a labor contract, standing alone, did not qualify as a statute within the meaning of the regulation.

Petitioner's argument that §434a-14.0 of the Administrative Code of the City of New York is a statute in the nature of a Workmen's Compensation Act is not flawed, as asserted in the opinion appealed from. The fact that the section is entitled "Discipline of Members," is irrelevant. It is the effect of the statute, and not its label that should be controlling here.

It is requested that the Court intercede and grant the Petition because the Court of Appeals incorrectly decided the case, to the undue detriment not only to Petitioner but also to several thousand other Police Officers of the City of New York.

POINT II.

Revenue Ruling 83-77 should not be applied retroactively because its application would cause unduly harsh effects upon Petitioner and all other similarly situated or because of prior administrative practice.

The Court of Appeals, in its decision, rejected Petitioner's claim that the Commissioner of Internal Revenue erred when he applied Revenue Ruling 83-77 retroactively to Petitioner's case. The Court noted that the Commissioner has discretion to retroactively apply his regulations and rulings, citing *Dixon v. United States,* 381 U.S. 68, 71 (1965). The Court stated that there was nothing in the record to indicate any abuse of the Commissioner's discretion. It is respectfully submitted that the Court below erred on this point.

In *Chock Full O'Nuts Corp. v. U.S.,* 453 F.2d 300 (2d Cir., 1971), the Court decided that while the IRS is empowered to prescribe the extent to which regulations shall be given retroactive effect (IRS Code §7805[b]), the Commissioner's authority in the area of applying a revenue ruling retroactively is subject to review for abuse of discretion. The Court further stated that the decision of the IRS in applying a revenue ruling retroactively must be a rational one, supported by relevant considerations. While retroactively in tax regulations is permissible, the Court in each individual case must consider all surrounding circumstances to determine whether retroactive application would be warranted.

In *Dunn v. U.S.,* 468 F. Supp. 991 (S.D.N.Y. 1978), the Court explicitly followed the principle enunciated in *Chock Full O'Nuts.* In deciding the issue of whether or not it was proper to apply a revenue ruling retroactively, the Court noted that retroactivity may be denied to a ruling where it would have an unduly harsh effect based upon the facts in a specific case. In *Dunn* the Court upheld the retroactivity of the Revenue Ruling in question. *Dunn* is distinguishable from the instant action

since the law in *Dunn* was clear, settled and entirely consistent with the Service's other rulings and regulations.

In the instant action, the retroactive application of Revenue Ruling 83-77 will have an undue harsh result. Since the surrounding circumstances of each case must be explored in determining whether or not it is proper to apply a ruling retroactively, the Court in the instant action should consider the hardship being cast upon the Petitioner, as well as upon several thousand other New York City Police Officers, active and retired, who, pursuant to Revenue Ruling 83-77 have been assessed back taxes on as much as three years of sick pay which they received while on sick leave due to a line of duty injury.

The reliance of the Petitioner on the excludable nature of his sick payments was warranted. Past Tax Court decisions and Internal Revenue Service rulings have been inconsistent with respect to the issues before this Court. Therefore, the harsh effect of applying Revenue Ruling 83-77 retroactively to New York City police officers should be considered by this Court.

One of the criteria in determining when a revenue ruling may be applied retroactively is prior administrative practice by the IRS. With respect to New York City Police Officers, it was prior practice of the IRS, in fact, to allow income tax exclusions for line of duty sick payments received in lieu of Worker's Compensation pursuant to §104(a)(1) of the IRS Code. Consistent with its practice of allowing these exclusions, the IRS also granted refunds to New York City Police Officers filing for a refund for wages received in lieu of Worker's Compensation. The administrative practice of continuously allowing such exclusions and refunds should be taken into account in deciding whether the Internal Revenue Service should be precluded from retroactively applying Revenue Ruling 83-77. Appellant in good faith relied upon such prior practices.

The Court of Appeals should have taken all of this into consideration, especially in light of the fact that retroactive applica-

tion here has a significant impact not only on Petitioner, but also several thousand New York City Police Officers, similarly situated to him.

Conclusion.

For the reasons stated above, it is respectfully requested that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

JOHN J. MAGUIRE
Counsel for Petitioner
LAW OFFICES OF RICHARD HARTMAN
252-00 Horace Harding Expressway
Little Neck, NY 11362
(718) 423-1800

APPENDIX A.

Memorandum Finding of Facts and Opinion of the United States Tax Court.

T. C. Memo. 1984-525

UNITED STATES TAX COURT

WILLIAM A. RUTTER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 13634-82. Filed October 2, 1984.

Joseph G. Metz, for the petitioner.

Elizabeth M. Fasciana, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

PANUTHOS, *Special Trial Judge:* This case was assigned to Special Trial Judge Peter J. Panuthos pursuant to the provisions of section 7456 (c) and (d)[1] and General Order No. 8, 81 T.C. XXIII (1983).

[1]All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

Respondent determined a deficiency in petitioner's 1978 Federal income tax in the amount of $1,062.76.

The only issue for decision is whether payments received by William A. Rutter (hereinafter petitioner) while on sickleave are excludible under section 104 (a) (1) as amounts received under a workmen's compensation act or a statute in the nature of a workmen's compensation act.

This case was submitted fully stipulated pursuant to Rule 122.[2] The stipulation of facts and exhibits attached are incorporated herein by this reference.

At the time of filing the petition in this case petitioner was a resident of New York City, New York.

Petitioner was employed in 1978 as a New York City Police Officer. Although the record does not disclose when he began working as a police officer in New York, petitioner was injured in the line of duty in July 1972. During 1978, as a result of his old line of duty injury, petitioner was absent from work for the following periods:

Periods of Absence

January 1, to February 19

February 20 to March 12

April 24 to August 17

Petitioner retired from the New York City Police Department on October 29, 1978. During his absence from work in 1978 and prior to his retirement in October of that year petitioner received sick-leave payments amounting to $10,873.45.

Petitioner relies upon the Administrative Code of the City of New York, Sec. 434a-14.0 (c). That section read as follows:

* * *

[2]All rule references are to the Tax Court Rules of Practice and Procedure.

> c. The commissioner is also authorized and empowered in his discretion, to deduct and withhold salary from any member or members of the force for or on account of absence for any cause without leave, lost time, sickness or other disability, physical or mental; provided, however, that the salary so deducted and withheld shall not, except in case of absence without leave, exceed one-half thereof for the period of such absence; and provided, further, that not more than one-half pay for three days shall be deducted on account of absence caused by sickness. * * *

The New York City Police Department Patrol Guide[3] also relied upon by petitioner provided for an internal method of handling a police officer's absence. The procedure for "Line of Duty Injury or Death Occurring Within City" is defined as "To report and record line of duty injuries and death", and "As used in this *procedure* [the investigator] will normally be the Lieutenant Operations Office of the precinct of occurrence." [Emphasis added.] The procedure is a twenty step process involving notification of various people, description of the circumstances under which the accident occurred, provisions for what to do if a member dies, and similar accident related procedures. The Reporting Sick procedure entails a twenty-five step process which also covers who is to be notified, how the notification is to occur and other rules dealing with the administrative mechanics of accounting for an officer who would not be on the job.

The contract between the City of New York and the Policemen's Benevolent Association (P.B.A.), Article X, Sec.2 a, provides as follows:

---

[3]On August 6, 1984, we granted a joint motion for leave to reopen the record in order to file a supplemental stipulation of facts. On the same date the Court filed the supplemental stipulation of facts which attached relevant portions of the New York City Police Department Patrol Guide.

Sick Leave.

a. Each employee shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, whether or not service-connected.

Neither the administrative provision nor the contract provide for any special remedy for injuries that are incurred in the line of duty.[4] The Patrol Guide distinguishes a line of duty injury from some other injury or illness only for the purpose of internal record keeping.

Petitioner claimed an exclusion for the amounts received as disability income on his 1978 Federal income tax return. Respondent disallowed this amount in full. Petitioner's position is that the payments were received pursuant to a statute in the nature of workmen's compensation act and therefore excludible from taxation under section 104 (a). Respondent, on the other hand, argues that the amounts received by petitioner were paid pursuant to a union contract that permitted payment of the petitioner's salary during his absence from work irrespective of whether or not his absence is the result of sickness or injury and whether or not service connected.

Section 104 (a) (1) provides that amounts received under a Workmen's Compensation Act are not included in gross income.[5] Section 1.104-1 (b), Income Tax Regs., provides as follows:

* * *

[4]The parties have stipulated that petitioner would have received the same salary payments whether he was absent from work due to a line of duty injury or whether he was absent due to other injury or illness.

[5]SEC. 104. *COMPENSATION FOR INJURIES OR SICKNESS.*

(a) *In General.* Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include-

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness; * * *

> (b) *Amounts received under workmen's compensation acts.* Section 104 (a) (1) excludes from gross income amounts which are received by an employee under a workmen's compensation act * * *, or under a statute in the nature of a workmen's compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment. * * *

The exclusion under section 104 (a) (1) applies to payments made under a statute in the nature of a workmen's compensation act for personal injuries or sickness incurred in the course of employment. *Haar v. Commissioner,* 78 T.C. 864, 867-868 (1982), affd. *per curiam* 709 F.2d 1206 (8th Cir. 1983); Sec. 1.104-1 (b), Income Tax Regs. Since the parties agree that the payments received by petitioner were not payments made under a workman's compensation act, we must determine whether such payments were made pursuant to a statute in the nature of a workman's compensation act. A statute is in the nature of a workman's compensation act only if it allows payments solely for personal injuries or sickness incurred in the course of employment. *Take v. Commissioner,* 82 T.C. 630, 634 (1984); *Haar v. Commissioner, supra* at 868.[6]

Petitioner argues that the New York City Administrative Code, the contract between the City of New York and the P.B.A. and the procedures contained in the New York City Police Department Patrol Guide are complementary to each other and together have the force and effect of a statute. We do not agree with this analysis.

Petitioner has relied on several New York cases to support the proposition that regulations, properly promulgated by an administrative agency and not in conflict with an express statutory provision, have the force and effect of law. While this may be true in some contexts, it is clear from the record before us that

---

[6]See also *Clifford v. Commissioner,* T.C. Memo. 1984-426.

there are no regulations issued by the police department which qualify for such treatment.[7]

In *Haar v. Commissioner, supra* at 867-869, this Court held that

> Section 104 (a) (1) allows the exclusion from gross income of only those amounts that are paid pursuant to workers' compensation acts or statutes in the nature of workers' compensation acts. A statute will not be considered akin to a workers' compensation act if it allows for disability payments for any reason other than on-the-job injuries. *Riley v. United States,* 140 Ct. Cl. 381, 156 F. Supp. 751 (1957). * * *

There is nothing in the statutory scheme presently before us, which constitutes a statute in the nature of a workmen's compensation act. Quite the contrary, the Administrative Code provides the broadest possible latitude for payment of salary to a police officer who is absent from duty irrespective of the reasons for that absence. We do not read the private contractual arrangement, or the in-house procedures employed by the police department as otherwise narrowing the administrative code.

Thus, we are satisfied that the payments made to petitioner were not made under a statute in the nature of a workmen's compensation act.[8]

Decision will be entered for the respondent.

---

[7]The patrol guide which distinguishes between line of duty injuries and other injuries or illnesses represents nothing more than the procedural format laid out by the police department, presumably unilaterally and without approval by any legislative body, for handling different kinds of absences from work.

[8]See *Clifford v. Commissioner, supra.*

APPENDIX B.

Decision of the United States Tax Court.

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

WILLIAM A. RUTTER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 13634-82

DECISION

Pursuant to the determination of the Court as set forth in its T.C. Memo. Opinion 1984-525, filed October 2, 1984, it is

ORDERED AND DECIDED that there is a deficiency in petitioner's 1978 Federal income tax in the amount of $1,062.76.

(Signed) Peter J. Panuthos
Peter J. Panuthos
Special Trial Judge

Entered: OCT 4 1984

APPENDIX C.
Opinion and Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 787 — August Term, 1984

(Argued: February 21, 1985 Decided: April 29, 1985)

Docket No. 84-4152

WILLIAM A. RUTTER,
Petitioner-Appellant,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Before:

VAN GRAAFEILAND, WINTER, and PRATT, *Circuit Judges.*

Petitioner William A. Rutter appeals from an order and decision of the United States Tax Court, Peter J. Panuthos, *Special Trial Judge*, that held payments he received while on sick leave were not excludable from his gross income since they were not amounts received under a workmen's compensation act or under a statute in the nature of a workmen's compensation act. Affirmed.

RAYMOND E. KERNO, Little Neck, NY (Joseph G. Metz, Elizabeth Platte Johnson, Law Offices of Richard Hartman, Little Neck, NY, of Counsel), *for Petitioner-Appellant.*

GILBERT S. ROTHENBERG, Washington, DC (Glenn L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Martha Brissette, Tax Division, Department of Justice, Washington, DC, of Counsel), *for Respondent-Appellee.*

PER CURIAM:

The sole issue before us is whether payments received by petitioner William A. Rutter while on sick leave from the New York City Police Department as the result of an injury received in the line of duty are excludable from gross income as amounts received under either a workmen's compensation act, 26 U.S.C. § 104(a)(1), or a statute in the nature of a workmen's compensation act, Treas. Reg. § 1.104-1(b) (1982). Finding that these payments met neither qualification, we conclude that they are not excludable from Rutter's gross income and affirm the order and decision of the tax court.

Although Rutter served as a New York City police officer during most of the taxable year 1978, he was absent from work for approximately six months of that year due to an injury sustained in the line of duty in 1972. During that absence, he received sick leave payments totaling $10,873.45. These payments were made pursuant to a labor contract between the City of New York and the Patrolmen's Benevolent Association of New York, Inc. The relevant portion of the contract provides that

> [e]ach employee shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, *whether or not service-connected.*

Empasis added.

The parties stipulated that this section of the labor contract is "consistent with" § 434a-14.0(c) of the Administrative Code of the City of New York, which provides that the New York City police commissioner is authorized

> to deduct and withhold salary from any member or members of the force for or on account of absence for any cause without leave, lost time, sickness or other disability.

On his 1978 federal income tax return, Rutter claimed an exclusion from gross income for the amount he had received as sick leave payments during that tax year, but the commissioner disallowed this amount in full. The tax court upheld the commissioner's determination and this appeal followed.

Section 61(a) of the Internal Revenue Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived, including compensation for services. 26 U.S.C. § 61(a). Under § 104(a)(1), however, "amount received under workmen's compensation acts as compensation for personal injuries or sickness" are excluded from gross income. 26 U.S.C. § 104(a)(1). Treasury regulation § 1.104-1 interprets § 104(a)(1) to exclude from gross income any amounts

> received by an employee under a workmen's compensation act * * * *or under a statute in the nature of a workmen's compensation act* which provides compensation to employees for personal injuries or sickness incurred in the course of employment.

Emphasis added.

Rutter does not claim that the plain language of the statute, § 104(a)(1), allows him to exclude his sick leave pay from gross income, since his sick leave pay was obviously not received "under a workmen's compensation act". Rutter does contend, however, that he qualifies under the regulation, § 1.104-1, which allows for the exclusion of payments made "under a statute in the nature of a workmen's compensation act."

To qualify under the regulation, however, Rutter must first show that he received his sick leave pay pursuant to a "statute", and this he cannot do. We recognize that courts have not limited the interpretation of the term "statute" in this section to state or federal statutes or city ordinances. For example, in *Dyer* v. *Commissioner of Internal Revenue*, 71 T.C. 560 (1979), the petitioner received sick leave payments pursuant to regulations of the Board of Education of the City of New York, and, reasoning that "[t]hese regulations [had] the force and effect of law", the tax court found that the payments were made under a "statute" for the purposes of § 104(a)(1).

However, Rutter's payments were not made pursuant to a regulation, but pursuant to a labor contract. A regulation, like a statute, is a rule of general applicability promulgated by a public agency to govern conduct within the agency's jurisdiction. A labor contract, unlike a statute, is an agreement between union and employer, modifiable at any time. That this particular labor contract involved a public employer is irrelevant to the legislative purposes behind the workmen's compensation exclusion, and does not convert the contract into a "statute". Finally, Rutter does not cite, nor have we found, any case holding that the term "statute" in Treasury Regulation § 1.104-1(b) can be stretched to include a labor con-

tract. In short, we hold that Rutter's sick leave payments are not excludable from his gross income because the labor contract under which they were paid does not qualify as a statute within the meaning of the regulation. *See* Rev. Rul. 83-77, 1983-1 C.B. 37, 38.

Rutter also argues that § 434a-14.0(c) of the Administrative Code of the City of New York may be viewed as a "statute in the nature of a workmen's compensation act" under which he received his sick leave payments. There are two flaws to this argument. First, Rutter did not receive his sick leave payments pursuant to this section; as he has stipulated, the payments were made pursuant to the labor contract. The fact that the parties also stipulated that the contract is "consistent with" this section of the New York City Administrative Code does not alter the basis for Rutter's sick leave payments. This section of the administrative code simply provides that the police commissioner is authorized to *deduct and withhold salary* from any member of the force "for or on account of absence for any cause without leave, lost time, sickness or other disability * * *". As suggested by the fact that § 434a-14.0 is entitled "Discipline of members", the section is intended to give the police commissioner the authority, within certain limits, to withhold pay on the account of absence, rather than to affirmatively authorize payments on account of disability or sickness.

Second, even if we were to assume that Rutter somehow received his payments under this section, he still could not succeed because the section is not a statute "in the nature of a workmen's compensation act". Unless a statute contains some provision restricting the payment of benefits to cases of work-related disabilities, it is not in the nature of a workmen's compensation statute.

Clifford v. *Commissioner*, 48 T.C.M. 1984-426; *see Riley* v. *United States*, 156 F. Supp. 751, 752 (Ct. Cl. 1957). Under the scheme for New York City policemen all sick leave is compensated, whether work related or not. Rutter's argument that his payments should qualify because they were in fact the result of a work-related injury is unavailing. In determining whether such payments are excludable from gross income, the regulation charges us to look to the nature of the statute, rather than the source of the injury, and a statute that does not distinguish between work-related injuries and other types of injuries is not "in the nature of a workmen's compensation statute".

We also reject Rutter's claim that the commissioner erred when he applied Rev. Rul. 83-77, promulgated in 1983, retroactively to Rutter's case. The commissioner has discretion to retroactively apply his regulations and rulings, *Dixon* v. *United States*, 381 U.S. 68, 71 (1965); *see* 26 U.S.C. § 7805(b), and nothing in the record indicates that the commissioner abused that discretion here.

Affirmed.